

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JARMAAL SMITH,

Plaintiff,

v.

DR. N. ADAMS, et al.,

Defendants.

No. C 10-4389 CW (PR)

ORDER OF SERVICE AND
PARTIAL DISMISSAL WITH
LEAVE TO AMEND

INTRODUCTION

Plaintiff, a state prisoner, has filed a pro se civil rights action pursuant to 42 U.S.C. § 1983 alleging claims of deliberate indifference to his serious medical needs and retaliation. Plaintiff has also filed a motion seeking preliminary injunctive relief (docket no. 9). His motion for leave to proceed in forma pauperis has been granted.

Venue is proper because the events giving rise to the claim are alleged to have occurred at Pelican Bay State Prison (PBSP) which is located in this judicial district. See 28 U.S.C. § 1391(b).

In his complaint, Plaintiff names the following Defendants: PBSP Licensed Vocational Nurses (LVN) B. Stone and A. Anders, PBSP Physician N. Adams, PBSP Nurse Practitioner S. Risenhoover and PBSP Correctional Officers R. Escobar and Hailey. Plaintiff seeks monetary damages and injunctive relief.

DISCUSSION

I. Standard of Review

A federal court must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity

1 or officer or employee of a governmental entity. 28 U.S.C.
2 § 1915A(a). In its review, the court must identify any cognizable
3 claims and dismiss any claims that are frivolous, malicious, fail
4 to state a claim upon which relief may be granted or seek monetary
5 relief from a defendant who is immune from such relief. Id.
6 § 1915A(b)(1), (2). Pro se pleadings must be liberally construed.
7 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.
8 1988).

9 To state a claim under 42 U.S.C. § 1983, a plaintiff must
10 allege two essential elements: (1) that a right secured by the
11 Constitution or laws of the United States was violated, and
12 (2) that the alleged violation was committed by a person acting
13 under the color of state law. West v. Atkins, 487 U.S. 42, 48
14 (1988).

15 II. Factual Background

16 Plaintiff suffers from "intermittent [sic] migraine [sic]
17 headaches," "involuntary nerve twitching" and chest pains.
18 (Compl. at 2, 4.) While at Corcoran State Prison in August 2008,
19 Plaintiff was first prescribed Gabapentin to treat his migraine
20 headaches and nerve twitching.

21 On December 2, 2009, Plaintiff was transferred to PBSP. The
22 medications he had been previously prescribed were automatically
23 continued for the first thirty days at PBSP. His medications
24 included 800 milligrams of Gabapentin every four hours. Plaintiff
25 claims that Defendants Stone and Anders denied Plaintiff medical
26 treatment by failing to administer Plaintiff's prescribed dosage
27 of Gabapentin in December 2009. Specifically, Plaintiff claims
28 that Stone and Anders administered a liquid, rather than pill,

1 form of Gabapentin to him, but knowingly failed to provide him
2 consistently with the full measurement of 16cc of liquid
3 Gabapentin, which is equivalent to the 800 milligram pill.

4 On December 22, 2009, Plaintiff confronted Defendant Stone
5 about not giving him the prescribed dosage of Gabapentin, and he
6 asked for her name -- which she did not reveal -- so that he could
7 file a complaint against her. (Id. at 14.) Defendant Stone took
8 back Plaintiff's morning medication, and she did not administer
9 his afternoon medication. (Id. at 15.) Plaintiff claims he
10 "suffered a minor headache" (Id.)

11 Also on December 22, 2009, Plaintiff's Gabapentin prescription
12 was amended from the "full 30 days" of coverage to "7 days" of
13 coverage. (Id.) Plaintiff alleges that Defendant Stone
14 "manipulated the doctor into amending Plaintiff's medication out
15 of retaliation against Plaintiff for disputing the amount of the
16 medication," and also for "asking for the LVN's name, with the
17 indication that he would file a complaint against her." (Id. at
18 16.) That same day, Plaintiff filed a grievance against Defendant
19 Stone.

20 On December 23, 2009, Defendant Stone administered Plaintiff's
21 morning liquid dose of Gabapentin at 14 ccs instead of 16 ccs.
22 Plaintiff did not mention the discrepancy to Defendant Stone.

23 On December 25, 2009, Defendant Anders administered
24 Plaintiff's evening liquid dose at 14 ccs instead of 16 ccs.
25 Plaintiff informed Defendant Anders of the discrepancy; however,
26 nothing was done to correct it.

27 On December 28, 2009, Plaintiff asked Defendant Anders why his
28 medication was not being administered at the prescribed schedule

1 of every four hours. Plaintiff alleges Defendant Anders "lied to
2 Plaintiff," stating that his medication was to be administered
3 every twelve hours, not every four hours. (Id. at 17.)

4 On December 29, 2009, Defendant Anders administered the
5 evening rounds of medication; however, he did not administer
6 Gabapentin to Plaintiff.

7 On December 30, 2009, Plaintiff asked Defendant Anders about
8 his medication. Defendant Anders replied that Plaintiff's
9 medication had been amended "from 3 a day to twice daily, and only
10 for a seven day period commencing on December 22, 2009." (Id. at
11 19.) Plaintiff asked Defendant Anders to issue a "bridge order,"
12 to continue his Gabapentin prescription, which Defendant Anders
13 refused to do. That same day, Plaintiff filed a grievance against
14 Defendant Anders.

15 On January 5, 2010, Defendant Adams evaluated Plaintiff. By
16 the time Plaintiff saw Defendant Adams, "at least a week" had
17 passed "since his medication had expired" (Id. at 20.)
18 During the appointment, Plaintiff requested a prescription for
19 Gabapentin and that he see a specialist for his migraine headaches
20 and nerve twitching. Defendant Adams looked through Plaintiff's
21 file and stated that "she did not see any recommendations from the
22 neurologist regarding 'Gabapentin.'" (Id. at 22.) Plaintiff
23 asked Defendant Adams to search the part of the file that
24 corresponded to 2008. Defendant Adams replied that she did not
25 need to review Plaintiff's file because she could not prescribe
26 Gabapentin regardless, in that PBSP does not issue that medication
27 for headaches. (Id. at 23.) Defendant Adams also told Plaintiff
28 "he wasn't going to die if he did not have medication for his

1 headaches, and that the best thing about migraine headaches is
2 that they do not occur every day, so he would be alright without
3 medication." (Id. at 24.) Defendant Adams further stated that
4 "if you just let migrane [sic] happen eventually they'll stop
5 altogether." (Id. at 25.) Plaintiff told Defendant Adams that
6 "he believed she was lying and that he was going to file a
7 complaint against her." (Id.) Defendant Adams responded,

8 File your complaint, it's not going to change anything
9 because they probably wouldn't approve it even if I tried
10 to prescrib [sic] it to you. They don't have medication
11 to be dishing out to people like you, you're a burden on
12 the state and we have to cut back on the medication that
13 we issue.

14 (Id.) That same day, Plaintiff filed a grievance against Defendant
15 Adams.¹

16 On January 13, 2010, Defendant Risenhoover discontinued the
17 Tylenol #3 pills prescribed by Defendant Adams without consulting
18 Plaintiff.

19 On January 14, 2010, Plaintiff "believes he submitted an
20 emergency health care request (sick call slip) requesting to have
21 his Tylenol #3 medication reinstated." (Id. at 26.) Within a
22 week, Plaintiff was seen by a triage nurse. Plaintiff alleges the
23 nurse was supposed to refer Plaintiff to a physician; however,
24 three weeks passed without Plaintiff being seen by a physician.
25 Plaintiff submitted another "sick call slip" with "EMERGENCY"
26 written at the top. (Id. at 27.)

27 ¹ Plaintiff writes that "on this same day of January 7, 2010
28 Plaintiff filed an administrative grievance against Dr. Adams."
(Compl. at 26.) Because Plaintiff has alleged that his meeting
with Dr. Adams occurred on January 5, 2010, the Court assumes that
he filed his grievance on January 5.

1 On January 27, 2010, Plaintiff was interviewed by Nurse Labans
2 regarding the grievances filed against Defendants Stone, Anders and
3 Adams.

4 On February 25, 2010, Plaintiff was seen by Defendant
5 Risenhoover in response to his sick call slips. Plaintiff inquired
6 why he had not been seen earlier, and Defendant Risenhoover replied
7 that "she did not think his condition was serious enough to warrant
8 immediate attention" (Id. at 28.) Defendant Risenhoover
9 also stated, "I don't believe you need Gabapentin for your
10 condition and that medication is not issued by" the California
11 Department of Corrections and Rehabilitation (CDCR). (Id. at 29.)
12 Plaintiff responded that he had been prescribed Gabapentin for
13 almost two years by CDCR medical staff. Plaintiff alleges
14 Defendant Risenhoover did not look at his file, and "did not appear
15 to be aware of any of the information that Plaintiff was conveying
16 to her." (Id. at 30.)

17 Plaintiff also "attempted to explain to this nurse that he had
18 recently been experiencing chest pain and cramping around his heart
19 area," that in August 2008 he was hospitalized for an irregular
20 heartbeat -- the origin of which had not been determined -- and
21 that he had been advised to tell prison staff to refer him to a
22 cardiologist. (Id. at 30.) He then asked Risenhoover to refer him
23 to a cardiologist because "his condition was worsening [sic],"
24 but Risenhoover responded that Plaintiff would have to submit
25 another sick call slip because he could only talk about one issue
26 at a time. (Id. at 31.) Plaintiff explained that "it took him
27 almost 2 months for him to be seen on this issue and he was having
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1 really bad cramping around his heart," and that "he was concerned
2 that he would not make it another 2 months." (Id.)

3 Defendant Hailey then opened the office door and informed
4 Defendant Risenhoover she had "5 minutes." (Id.) Plaintiff asked
5 Defendant Risenhoover whether she had reviewed his file prior to
6 his visit. Defendant Risenhoover responded, "I don't need to,
7 migraines are not treated with Gabapentin." (Id. at 32.)
8 Plaintiff repeated that he was not receiving medication to treat
9 his headaches, to which Defendant Risenhoover responded, "I know
10 you've probably been taking somebody else's medications." (Id.)
11 Defendant Hailey again opened the door and announced that
12 Plaintiff's time was up. Defendant Risenhoover did not prescribe
13 Plaintiff any medication.

14 On February 26, 2010, Plaintiff's three grievances were denied
15 at the first level of review by Chief Medical Officer M. Sayre.

16 On March 3, 2010, Plaintiff filed a grievance against
17 Defendant Hailey.

18 On March 4, 2010, Plaintiff was informed by an unidentified
19 LVN that Defendant Risenhoover had ordered a feces test for
20 Plaintiff. Plaintiff refused to take the test because "he did not
21 discuss anything with [Defendant Risenhoover] relating to his bowel
22 movements." (Id. at 33.)

23 On March 9, Plaintiff filed a grievance against Defendant
24 Risenhoover; however, on March 11, 2010, PBSP "refused to process"
25 Plaintiff's grievance because of his three "outstanding"
26 grievances. Plaintiff resubmitted his grievance that same day. On
27 March 12, 2010, Plaintiff's grievance was returned a second time
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1 for the same reason. Plaintiff was advised that if he resubmitted
2 the grievance, "he would not receive it back." (Id. at 35.)

3 On March 18, 2010, Plaintiff complained to a LVN that he had
4 been experiencing "chest pain" and "very bad cramping around his
5 heart . . . all day." (Id.) The LVN notified Defendant Escobar,
6 who responded to the scene. Plaintiff was escorted to the "B"
7 Facility clinic. Plaintiff described his heart history to
8 Defendant Escobar, and explained that his conditions were
9 worsening. Plaintiff also explained that around 12:00 p.m. that
10 day, he had suddenly felt "out of breath." (Id. at 36.) Defendant
11 Escobar established that Plaintiff's "pulse was low." (Id.)
12 Defendant Escobar explained that Plaintiff's heartbeat was probably
13 low "because he worked out." (Id.) Plaintiff responded that he
14 does not work out. Defendant Escobar "accused Plaintiff of lying
15 about not exercising and that this condition was probably not as
16 bad as it seemed." (Id.) Defendant Escobar sent Plaintiff back to
17 his cell without either treatment or a referral to PBSP's "CTC"²
18 facility, which he describes as "the institution's hospital used
19 for treating emergency situations." Plaintiff alleges that
20 Defendant Escobar did not seek to admit him to the CTC facility
21 "for punitive purposes and with malicious intentions," which is
22 "evidenced by the fact that [he] mocked Plaintiff, did not take him
23 seriously and accused Plaintiff of lying." (Id. at 39.)

24 Later that night, Plaintiff became lightheaded while
25 experiencing cramping around his heart. He then "collapsed to the
26 floor of his cell." (Id. at 37.) A correctional officer contacted
27 medical staff, and Plaintiff was seen by a nurse.

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² Plaintiff does not explain what CTC stands for.

1 On March 27, 2010, Plaintiff experienced a migraine headache
2 and submitted another sick cell slip.

3 On March 28, 2010. Plaintiff submitted a grievance against
4 Defendant Escobar.

5 On April 1, 2010, Plaintiff was seen by Defendant Risenhoover
6 for a second time. Plaintiff explained he had been experiencing
7 "very bad cramping around his heart" and an "accelerated
8 heartbeat." (Id. at 40.) Plaintiff requested a referral to a
9 cardiologist. Defendant Risenhoover responded, "Who's going to pay
10 for it? The state doesn't have that kind of money." (Id. at 41.)
11 Defendant Risenhoover then stated, "I don't believe your condition
12 is serious enough to refer you to a cardiologist." (Id.)
13 Plaintiff also attempted to request medication for his migraine
14 headaches based on a specialist's recommendations, but Defendant
15 Risenhoover replied that "we don't actually have to follow their
16 recommendations." (Id. at 42.)

17 Plaintiff states, "To deal with these headaches without remedy
18 . . . amounts to torture because Plaintiff is made to endure an
19 extremely painful condition when he doesn't have to." (Id. at 47.)
20 He adds that his nerve twitching condition is "painful at times and
21 causes enormous discomfort and significantly effects [sic]
22 Plaintiff's daily activities." (Id. at 49.) Finally, he states,
23 "Plaintiff's heart condition not only causes him pain from cramping
24 but it also causes him a great deal of fear that he will . . .
25 [have] a heart attack and die or suffer a stroke." (Id. at 49.)

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1 III. Legal Claims

2 A. Deliberate Indifference to Serious Medical Needs

3 Deliberate indifference to serious medical needs violates the
4 Eighth Amendment's proscription against cruel and unusual
5 punishment. See Estelle v. Gamble, 429 U.S. 97, 104 (1976);
6 McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992), overruled
7 on other grounds, WMX Technologies, Inc. v. Miller, 104 F.3d 1133,
8 1136 (9th Cir. 1997) (en banc); Jones v. Johnson, 781 F.2d 769, 771
9 (9th Cir. 1986). A determination of "deliberate indifference"
10 involves an examination of two elements: the seriousness of the
11 prisoner's medical need and the nature of the defendant's response
12 to that need. See McGuckin, 974 F.2d at 1059. A "serious" medical
13 need exists if the failure to treat a prisoner's condition could
14 result in further significant injury or the "unnecessary and wanton
15 infliction of pain." Id. (citing Estelle, 429 U.S. at 104). A
16 prison official is deliberately indifferent if he or she knows that
17 a prisoner faces a substantial risk of serious harm and disregards
18 that risk by failing to take reasonable steps to abate it. Farmer
19 v. Brennan, 511 U.S. 825, 837 (1994).

20 Assuming Plaintiff's medical needs were "serious," Plaintiff
21 must allege facts which support a finding of deliberate
22 indifference to those needs by Defendants Stone, Anders, Adams,
23 Escobar, Risenhoover and Hailey. Such indifference may appear when
24 prison officials deny, delay or intentionally interfere with
25 medical treatment, or it may be shown in the way in which prison
26 officials provide medical care. See McGuckin, 974 at 1062.

27 Here, according to Plaintiff's allegations, Defendants Stone
28 and Anders denied Plaintiff medical treatment by failing to

1 administer Plaintiff's prescribed dosage of Gabapentin, and
2 Defendant Adams and Risenhoover denied Plaintiff medical treatment
3 by failing to treat Plaintiff's migraine headaches and nerve
4 twitching. Additionally, according to Plaintiff's allegations,
5 Defendants Risenhoover and Escobar denied Plaintiff medical
6 treatment by failing to review Plaintiff's medical records to
7 confirm that he had a heart condition and had been advised to see a
8 cardiologist.

9 Accordingly, Plaintiff's allegations present a cognizable claim
10 of deliberate indifference to serious medical needs against
11 Defendants Stone, Anders, Adams, Risenhoover and Escobar for their
12 failure to provide Plaintiff with medical care in response to his
13 symptoms. See Lolli v. County of Orange, 351 F.3d 410, 420-21 (9th
14 Cir. 2003) (holding that a jury could infer that correctional
15 officers' failure to provide medical care in response to detainee's
16 extreme behavior, sickly appearance and statements that he was
17 diabetic and needed food demonstrated deliberate indifference).

18 The complaint does not state a claim for relief against
19 Defendant Hailey, because Defendant Hailey is not linked
20 specifically to the allegations in the body of the complaint.
21 Liability may be imposed on an individual defendant under § 1983 if
22 the plaintiff can show that the defendant proximately caused the
23 deprivation of a federally protected right. See Leer v. Murphy,
24 844 F.2d 628, 634 (9th Cir. 1988); Harris v. City of Roseburg, 664
25 F.2d 1121, 1125 (9th Cir. 1981). A person deprives another of a
26 constitutional right within the meaning of § 1983 if he does an
27 affirmative act, participates in another's affirmative act or omits
28 to perform an act which he is legally required to do, that causes

1 the deprivation of which the plaintiff complains. See Leer, 844
2 F.2d at 633. The inquiry into causation must be individualized and
3 focus on the duties and responsibilities of each individual
4 defendant whose acts or omissions are alleged to have caused a
5 constitutional deprivation. See id. Sweeping conclusory
6 allegations will not suffice; the plaintiff must instead set forth
7 specific facts as to each individual defendant's deprivation of
8 protected rights. Id. at 634.

9 While Plaintiff alleges that Defendant Hailey informed
10 Defendant Adams of the time remaining in Plaintiff's appointment,
11 Plaintiff has not linked Defendant Hailey to his deliberate
12 indifference claims. As such, Plaintiff has failed to state a
13 cognizable deliberate indifference claim against Defendant Hailey.
14 Accordingly, Plaintiff's claim against Defendant Hailey is
15 DISMISSED with leave to amend. Plaintiff may reassert his
16 deliberate indifference claim against Defendant Hailey in an
17 amendment to the complaint if he can, in good faith, allege facts
18 demonstrating that Defendant Hailey knew Plaintiff faced a
19 substantial risk of serious harm and disregarded that risk by
20 failing to take reasonable steps to abate it. Farmer, 511 U.S. at
21 837.

22 B. Retaliation

23 "Within the prison context, a viable claim of First Amendment
24 retaliation entails five basic elements: (1) An assertion that a
25 state actor took some adverse action against an inmate (2) because
26 of (3) that prisoner's protected conduct, and that such action
27 (4) chilled the inmate's exercise of his First Amendment rights,
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1 and (5) the action did not reasonably advance a legitimate
2 correctional goal." Rhodes v. Robinson, 408 F.3d 559, 567-68 (9th
3 Cir. 2005) (footnote omitted). To prove retaliation, a plaintiff
4 must show that the defendants took adverse action against him or
5 her that "would chill or silence a person of ordinary firmness from
6 future First Amendment activities." White v. Lee, 227 F.3d 1214,
7 1228 (9th Cir. 2000) (citing Mendocino Env'tl. Ctr. v. Mendocino
8 County, 192 F.3d 1283, 1300 (9th Cir. 1999)).

9 Plaintiff alleges that, because he asked for Defendant Stone's
10 name and indicated that he would file a complaint against her,
11 she retaliated against him by manipulating the doctor into changing
12 the remaining length of his Gabapentin prescription from thirty to
13 seven days. (Compl. at 16.) Plaintiff has not alleged facts
14 sufficient to support each of the elements of retaliation. In
15 addition, his conclusory allegation of wrongdoing on the part of
16 Defendant Stone -- based on her manipulating the doctor -- is
17 speculative and thus insufficient to state a cognizable claim for
18 relief. Furthermore, the alleged retaliation occurred prior to
19 Plaintiff filing his grievance against Defendant Stone. Thus,
20 without proof that a grievance was filed prior to the manipulation
21 of his medication, Plaintiff cannot show that this adverse action
22 against him was because of a protected conduct. Plaintiff has
23 failed to state a cognizable retaliation claim against Defendant
24 Stone.

25 Accordingly, Plaintiff's retaliation claim against Defendant
26 Stone is DISMISSED with leave to amend. Plaintiff may reassert his
27 retaliation claim against Defendant Stone in an amendment to the
28 complaint if Plaintiff can, in good faith, allege that he engaged

1 in constitutionally protected conduct, that Defendant Stone took
2 adverse action against him in retaliation for the protected
3 conduct, and that Plaintiff suffered harm as a result of the
4 retaliation.

5 IV. Motion for a Preliminary Injunction

6 Plaintiff seeks immediate injunctive relief to order Defendants
7 Adams and Risenhoover to provide Plaintiff with Gabapentin at 800
8 mgs. to treat his migraine headaches. (Mot. for Prelim. Inj. at
9 1.) Prior to granting a preliminary injunction, however, notice to
10 the adverse party is required. See Fed. R. Civ. P. 65(a)(1).
11 Therefore, a motion for preliminary injunction cannot be decided
12 until the parties to the action are served. See Zepeda v. INS, 753
13 F.2d 719, 727 (9th Cir. 1983). A temporary restraining order (TRO)
14 may be granted without written or oral notice to the adverse party
15 or that party's attorney only if: (1) it clearly appears from
16 specific facts shown by affidavit or by the verified complaint that
17 immediate and irreparable injury, loss or damage will result to the
18 applicant before the adverse party or the party's attorney can be
19 heard in opposition, and (2) the applicant's attorney certifies in
20 writing the efforts, if any, which have been made to give notice
21 and the reasons supporting the claim that notice should not be
22 required. See Fed. R. Civ. P. 65(b). Although Plaintiff swears
23 under penalty of perjury that the information contained in his
24 pleadings is true and correct, and thus the pleadings may be deemed
25 affidavits, and although the first pleading describes Plaintiff's
26 circumstances with a fair amount of specificity, it does not
27 clearly appear from the pleadings that Plaintiff will suffer
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1 immediate and irreparable injury before Defendants can be given an
2 opportunity to respond.

3 Plaintiff claims that Defendants Adams and Risenhoover have
4 terminated his prescription for Gabapentin, which he first received
5 on August 12, 2008. Plaintiff claims that since his Gabapentin
6 medication "was discontinued he has experienced migraine headaches"
7 on at least thirteen occasions, the most recent migraine headache
8 occurring on February 21, 2011. (Mot. for Prelim. Inj. at 5.)
9 While a migraine headache can be a debilitating and painful
10 condition, the pleadings do not clearly show that Plaintiff will
11 suffer irreparable injury.

12 In light of these circumstances, the Court directs Defendants
13 Adams and Risenhoover to respond to the motion for preliminary
14 injunction as directed below.

15 CONCLUSION

16 For the foregoing reasons, the Court orders as follows:

17 1. Plaintiff states a cognizable Eighth Amendment claim
18 against Defendants Stone, Anders, Adams, Risenhoover and Escobar
19 for deliberate indifference to serious medical needs.

20 2. Plaintiff's Eighth Amendment claim against Defendant
21 Hailey for deliberate indifference to serious medical needs is
22 DISMISSED with leave to amend as indicated above.

23 3. Plaintiff's First Amendment claim against Defendant Stone
24 for retaliation is DISMISSED with leave to amend as indicated
25 above.

26 4. Within thirty (30) days of the date of this Order,
27 Plaintiff may file an amended Eighth Amendment claim against
28 Defendant Hailey and an amended First Amendment claim against

1 Defendant Stone as set forth above in Section III(A) and (B) of
2 this Order. (Plaintiff shall resubmit only those claims and not
3 the entire complaint.) The amended claims must be submitted on an
4 amendment to the complaint. It must include the caption as well as
5 the civil case number of this action (C 10-4389 CW (PR)) and the
6 words AMENDMENT TO THE COMPLAINT on the first page. The failure to
7 do so will result in the dismissal without prejudice of the Eighth
8 Amendment claim against Defendant Hailey and the First Amendment
9 claim against Defendant Stone.

10 5. The Clerk of the Court shall mail a Notice of Lawsuit and
11 Request for Waiver of Service of Summons, two copies of the Waiver
12 of Service of Summons, a copy of the complaint and all attachments
13 thereto (docket no. 1) and a copy of this Order to PBSP Licensed
14 Vocational Nurses B. Stone and A. Anders, PBSP Physician N. Adams,
15 PBSP Nurse Practitioner S. Risenhoover and PBSP Correctional
16 Officer R. Escobar. The Clerk of the Court shall also mail a copy
17 of the complaint and a copy of this Order to the State Attorney
18 General's Office in San Francisco. Additionally, the Clerk shall
19 mail a copy of this Order to Plaintiff.

20 6. Defendants are cautioned that Rule 4 of the Federal Rules
21 of Civil Procedure requires them to cooperate in saving unnecessary
22 costs of service of the summons and complaint. Pursuant to Rule 4,
23 if Defendants, after being notified of this action and asked by the
24 Court, on behalf of Plaintiff, to waive service of the summons,
25 fail to do so, they will be required to bear the cost of such
26 service unless good cause be shown for their failure to sign and
27 return the waiver form. If service is waived, this action will
28 proceed as if Defendants had been served on the date that the

1 waiver is filed, except that pursuant to Rule 12(a)(1)(B),
2 Defendants will not be required to serve and file an answer before
3 sixty (60) days from the date on which the request for waiver was
4 sent. (This allows a longer time to respond than would be required
5 if formal service of summons is necessary.) Defendants are asked
6 to read the statement set forth at the foot of the waiver form that
7 more completely describes the duties of the parties with regard to
8 waiver of service of the summons. If service is waived after the
9 date provided in the Notice but before Defendants have been
10 personally served, the Answer shall be due sixty (60) days from the
11 date on which the request for waiver was sent or twenty (20) days
12 from the date the waiver form is filed, whichever is later.

13 7. Defendants shall answer the complaint in accordance with
14 the Federal Rules of Civil Procedure. The following briefing
15 schedule shall govern dispositive motions in this action:

16 a. No later than ninety (90) days from the date their
17 answer is due, Defendants shall file a motion for summary judgment
18 or other dispositive motion. The motion shall be supported by
19 adequate factual documentation and shall conform in all respects to
20 Federal Rule of Civil Procedure 56. If Defendants are of the
21 opinion that this case cannot be resolved by summary judgment, they
22 shall so inform the Court prior to the date the summary judgment
23 motion is due. All papers filed with the Court shall be promptly
24 served on Plaintiff.

25 b. Plaintiff's opposition to the dispositive motion
26 shall be filed with the Court and served on Defendants no later
27 than sixty (60) days after the date on which Defendants' motion is
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1 filed. The Ninth Circuit has held that the following notice should
2 be given to pro se plaintiffs facing a summary judgment motion:

3 The defendant has made a motion for summary
4 judgment by which they seek to have your case dismissed.
5 A motion for summary judgment under Rule 56 of the
6 Federal Rules of Civil Procedure will, if granted, end
7 your case.

8 Rule 56 tells you what you must do in order to
9 oppose a motion for summary judgment. Generally, summary
10 judgment must be granted when there is no genuine issue
11 of material fact -- that is, if there is no real dispute
12 about any fact that would affect the result of your case,
13 the party who asked for summary judgment is entitled to
14 judgment as a matter of law, which will end your case.
15 When a party you are suing makes a motion for summary
16 judgment that is properly supported by declarations (or
17 other sworn testimony), you cannot simply rely on what
18 your complaint says. Instead, you must set out specific
19 facts in declarations, depositions, answers to
20 interrogatories, or authenticated documents, as provided
21 in Rule 56(e), that contradict the facts shown in the
22 defendant's declarations and documents and show that
23 there is a genuine issue of material fact for trial. If
24 you do not submit your own evidence in opposition,
25 summary judgment, if appropriate, may be entered against
26 you. If summary judgment is granted [in favor of the
27 defendants], your case will be dismissed and there will
28 be no trial.

17 See Rand v. Rowland, 154 F.3d 952, 962-63 (9th Cir. 1998) (en
18 banc).

19 Plaintiff is advised to read Rule 56 of the Federal Rules of
20 Civil Procedure and Celotex Corp. v. Catrett, 477 U.S. 317 (1986)
21 (party opposing summary judgment must come forward with evidence
22 showing triable issues of material fact on every essential element
23 of his claim). Plaintiff is cautioned that because he bears the
24 burden of proving his allegations in this case, he must be prepared
25 to produce evidence in support of those allegations when he files
26 his opposition to Defendants' dispositive motion. Such evidence
27 may include sworn declarations from himself and other witnesses to
28 the incident, and copies of documents authenticated by sworn

1 declaration. Plaintiff will not be able to avoid summary judgment
2 simply by repeating the allegations of his complaint.

3 c. Defendants shall file a reply brief no later than
4 thirty (30) days after the date Plaintiff's opposition is filed.

5 d. The motion shall be deemed submitted as of the date
6 the reply brief is due. No hearing will be held on the motion
7 unless the Court so orders at a later date.

8 8. The Court further orders as follows:

9 a. On the same date their answer is due, Defendants
10 shall respond to the motion for preliminary injunction (docket no.
11 9). The response to the motion for preliminary injunction shall be
12 supported by adequate factual documentation and shall conform in
13 all respects to the Federal Rules of Civil Procedure, and all
14 papers filed with the Court shall be promptly served on Plaintiff.

15 b. Plaintiff may file a reply within fourteen (14) days
16 of the date Defendants' response is filed. Plaintiff's reply
17 should be supported by factual documentation and should demonstrate
18 why Plaintiff satisfies the following standard:

19 Under the traditional test for granting preliminary injunctive
20 relief, Plaintiff must: (1) establish a strong likelihood of
21 success on the merits; (2) show the possibility of irreparable
22 injury to Plaintiff if the preliminary relief is not granted;
23 (3) show a balance of hardships favoring Plaintiff; and (4) show
24 that granting the injunction favors the public interest. See Los
25 Angeles Memorial Coliseum Comm'n v. Nat'l Football League, 634 F.2d
26 1197, 1200 (9th Cir. 1980).

27 The Prison Litigation Reform Act requires further that
28 preliminary injunctions relating to prison conditions "be narrowly

1 drawn, extend no further than necessary to correct the harm the
2 court finds requires preliminary relief, and be the least intrusive
3 means necessary to correct that harm." 18 U.S.C. § 3626(a)(2).

4 The Court must give "substantial weight to any adverse impact on
5 public safety or the operation of a criminal justice system caused
6 by the preliminary relief." 18 U.S.C. § 3626(a)(2).

7 9. Discovery may be taken in this action in accordance with
8 the Federal Rules of Civil Procedure. Leave of the Court pursuant
9 to Rule 30(a)(2) is hereby granted to Defendants to depose
10 Plaintiff and any other necessary witnesses confined in prison.

11 10. All communications by Plaintiff with the Court must be
12 served on Defendants, or Defendants' counsel once counsel has been
13 designated, by mailing a true copy of the document to Defendants or
14 Defendants' counsel.

15 11. It is Plaintiff's responsibility to prosecute this case.
16 Plaintiff must keep the Court informed of any change of address and
17 must comply with the Court's orders in a timely fashion.

18 12. Extensions of time are not favored, though reasonable
19 extensions will be granted. Any motion for an extension of time
20 must be filed no later than fifteen (15) days prior to the deadline
21 sought to be extended.

22 IT IS SO ORDERED.

23 DATED: 10/17/2011

24 
CLAUDIA WILKEN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

JARMAAL SMITH,
Plaintiff,

Case Number: CV10-04389 CW

v.

CERTIFICATE OF SERVICE

NANCY ADAMS et al,
Defendant.

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on October 17, 2011, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Jarmaal Smith T76804
PBSP, ASU D-#1
P.O. Box 7500
Crescent City, CA 95532

Dated: October 17, 2011

Richard W. Wieking, Clerk
By: Nikki Riley, Deputy Clerk